Supreme Court, U. S.
FILED
JAN 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1037

In the Matter of

SOUTHWEST RESTAURANT SYSTEMS, INC., an Arizona corporation, dba PINNACLE PEAK PATIO,

---

STOCKTON & HING,

Petitioner,

v.

JOHN EVANS, Trustee of SOUTHWEST RESTAURANT SYSTEMS, INC., and HARVEY R. McELHANON, JR., and DOREEN T. McELHANON, his wife,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jack E. Evans
JACK E. EVANS, LTD.
1000 Del Webb Building
3800 North Central Ave.
Phoenix, Arizona 85012
Attorney for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

In the Matter of

SOUTHWEST RESTAURANT SYSTEMS, INC., an Arizona corporation, dba PINNACLE PEAK PATIO,

---

STOCKTON & HING,

Petitioner,

v.

JOHN EVANS, Trustee of SOUTHWEST RESTAURANT SYSTEMS, INC., and HARVEY R. McELHANON, JR., and DOREEN T. McELHANON, his wife,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jack E. Evans
JACK E. EVANS, LTD.
1000 Del Webb Building
3800 North Central Ave.
Phoenix, Arizona 85012
Attorney for Respondents

THE CONSOLIDATED DECISIONS BY THE COURT OF APPEALS FOR THE NINTH CIRCUIT DO NOT PRESENT ANY REASON FOR THIS COURT TO EXERCISE ITS SOUND DISCRETION TO GRANT REVIEW SINCE THE DECISIONS REFLECT A CORRECT APPLICATION OF THE LAWS OF THE STATE OF ARIZONA AND DO NOT CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT, THE COURT OF CLAIMS, THE SUPREME COURT OF ARIZONA OR ANY OTHER COURT.

The petitioner has failed to present any special and important reason for this Court to exercise its sound discretion to grant a review of the two consolidated judgments of the Court of Appeals for the Ninth Circuit as required by Rule 19 of the Rules of the Supreme Court of the United States. The two consolidated decisions by the Court of Appeals for the Ninth Circuit do not conflict with the decision of another Court of Appeals or the Court of Claims nor do they conflict with the law of the State of Arizona. No question of federal law is involved which in any way conflicts with a prior decision of this Court.

Two issues were decided by the Court of Appeals for the Ninth Circuit, to wit:

1. A writ of garnishment served by a judgment creditor on an Arizona corporation creates an inchoate lien on shares of stock owned by the judgment debtor in that corporation where the certificate previously representing the ownership of the shares of stock has been canceled and surrendered to the issuing corporation. Kuffel v. United States, 103 Ariz. 321, 441 P.2d 771 (1968); A.R.S. §44-3032; Heinicke Instruments Co. v. Republic Corp. (9th Cir. 1976), 20 U.C.C. Rep. 1, reversing Heinicke Instruments Co. v. Block (D.C. Ore., 1974), 14 U.C.C. Rep. 167.

2. An attorney does not have either a valid common law attorney's retaining lien or a consensual possessory lien on shares of stock owned by his client after the attorney has voluntarily canceled the certificate representing the ownership of

the shares of stock and surrendered the certificate to the issuing corporation. A.R.S. §44-3126. A possessory security interest is lost when possession is surrendered. (Id.)

The petitioner has misconstrued the ratio decidendi of the Court of Appeals for the Ninth Circuit. The issue formulated by the Court of Appeals for the Ninth Circuit in the cases sub judice is not whether an attorney can create a consensual lien and therefore have a perfected security interest under the Uniform Commercial Code. Instead, the Court of Appeals for the Ninth Circuit held that irrespective of the form of lien asserted by the petitioner the requisite element of "possession" of the property (a valid stock certificate) was missing. The Court of Appeals for the Ninth Circuit held:

> "We agree with the Bankruptcy Court's determination that Harris' stock certificate became non-

negotiable and ceased to represent Harris' stock interest when the certificate was voided on its face in October, 1973. Stockton & Hing's retaining lien covered, therefore, a voided certificate that ceased to be of value.

The law firm contends, however, that its possession of certificate No. 4, issued by the debtor corporation to Greer, gives the law firm a continuing interest in the stock. This argument must also be rejected. The Bankruptcy Court's decision in May of 1975 clearly declared the attempted transfer between Harris and Greer to be void and of no force and effect. Thus, certificate No. 4 was, in effect, rendered non-negotiable and without value by the court's decision.

A security that has been surrendered to the issuer may be attached at the source, i.e., at the issuer's office. See U.C.C. 8-317 (A.R.S. 44-3032). The District Court intimated that Harris' stock might be deemed 'to have been constructively surrendered to the issuer for purpose of determining the validity of the attempted garnishment' were it not for the adoption of Article 9 in Arizona representing a policy decision in favor of allowing creditors to obtain protectable security interests. It is now evident, however, that Stockton & Hing

never possessed an Article 9 security interest with respect to stock in the debtor corporation. And, after certificate No. 3 was voided in October, 1973, and the attempted Harris-Greer stock conveyance was declared to be void and without legal effect, Stockton & Hing ceased to possess a meaningful retaining lien on Harris' stock interest."

As stated in the foregoing quote, it is immaterial whether the petitioner alleges that it had a common law retaining lien or a security interest under the Uniform Commercial Code. Either of the liens would have required possession of a valid stock certificate.

The Court of Appeals for the Ninth Circuit relied on Arizona statutes and a prior decision by the Arizona Supreme Court. While the petitioner states in the rubric on page 22 of the petitioner's Petition that the decisions by the Ninth Circuit conflict with a prior decision by the Arizona Supreme Court, the petitioner fails to cite the particular decision to

which the petitioner refers. Instead the petitioner cites two decisions by the Arizona Court of Appeals involving real property law questions. [City of Glendale v. Arizona Savings & Loan Association, in Receivership, 2 Ariz.App. 379, 409 P.2d 299 (1965); Kalmanoff v. Weitz, 8 Ariz.App. 177, 444 P.2d 728 (1968).] In the City of Glendale v. Arizona Savings & Loan Association, in Receivership case, the sole issue presented to and decided by the court was whether an agreement by landowners to pay a fee to cause the City of Glendale to extend its sewer line created an equitable lien on the landowners' land. In Kalmanoff v. Weitz, the only issue presented to and decided by the court was whether a real estate broker's exclusive listing agreement to obtain tenants for real property created an equitable lien on real property. Decisions by Arizona's intermediate appellate court concerning real property law have no

possible relevancy to the present cases.

The petitioner has erroneously relied upon a series of cases concerning the priority of a landlord's security interest under the Uniform Commercial Code. In Re Lickie Freeburn Coal Company, 405 F.2d 1043 (6th Cir. 1969); In Re King Furniture City, Inc., 240 F.Supp. 453 (Ark. 1965); Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C.App. 242, 178 S.E.2d 124 (1970). The gravamen of the decisions relied upon by the petitioner is that where a state grants a landlord the statutory right to distrain for rent, the statutory lien so created is excluded from the provisions of the Uniform Commercial Code. However, the cases cited by the petitioner emphasize that where the landlord relies upon a provision contained in a written lease for the efficacy of the landlord's lien, the same is then a consensual lien and is governed by the Uniform Commercial Code.

The petitioner is trying the patience of the Court by reason of its present assertion that it has a valid security interest in the stock owned by Harris after repeatedly avowing to the Maricopa County Superior Court and the Federal District Court that Harris owned no stock. The petitioner planned, prepared, and carried into effect documents which were designed for the express purpose of hindering, delaying and defrauding a judgment creditor. The petitioner, in an attempt to perpetrate the fraudulent scheme conceived by it, caused Harris to surrender his stock certificate to the corporation for cancellation. Thereafter, the petitioner repeatedly asserted that Harris owned no stock in the corporation. Approximately one year later, after a lengthy trial, the Arizona Federal District Court held that the documents prepared by the petitioner purportedly transferring the Harris stock to

Greer were for the express purpose of hindering, delaying and defrauding a judgment creditor and that the purported transfer was therefore void, as a consequence of which Harris was the owner of the stock.

CONCLUSION

It is respectfully submitted that the petitioner has presented no reason for this Court to exercise its sound discretion to review the judgments of the Court of Appeals for the Ninth Circuit, as a result of which the petitioner's Petition for review should be denied.

Respectfully submitted this 16 day of January, 1980.

JACK E. EVANS, LTD

By _____
Jack E. Evans
1000 Del Webb Building
3800 North Central Avenue
Phoenix, Arizona 85012
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of January, 1980, three copies of Respondents' Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to:

Russell S. Olds, Esq.
STOCKTON & HING
234 North Central Avenue
Suite 507
Phoenix, Arizona 85004
(Attorneys for Petitioner)

Jack E. Evans
1000 Del Webb Building
3800 North Central Avenue
Phoenix, Arizona 85012
Attorney for Respondents

STATE OF ARIZONA)
) ss.
County of Maricopa)

SUBSCRIBED AND SWORN to before me this 16 day of January, 1980.

Notary Public

My commission expires:

10-10-82